UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: July 22, 1992

FAA Order No. 92-47

In the Matter of:	Docket No. CP90AL0295
DAVID LLOYD CORNWALL	

DECISION AND ORDER

Complainant Federal Aviation Administration (FAA) ("Complainant") and Respondent David Lloyd Cornwall ("Respondent") have both appealed from the written initial decision issued by Administrative Law Judge Burton S. Kolko on October 23, 1991.[1/] The law judge dismissed the allegation that Respondent operated an aircraft in a careless or reckless manner in violation of Section 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. § 91.9 (1988).[2/] He found, however, that Respondent violated Section 91.79(c) of the FAR, 14 C.F.R. § 91.79(c), by operating his aircraft closer than

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1/ A copy of the law judge's initial decision is attached.

2/ Part 91 of the FAR was recodified effective August 18, 1990. The citations in this opinion and order are to the former Part 91 sections, because the incident in question occurred before the recodification. In the recodified version of Part 91, former § 91.9 is § 91.13(a). The recodification did not affect the substance of this provision.

14 C.F.R. § 91.9 (1988) provided: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

500 feet to people and boats on the water when it was not necessary for takeoff or landing.[3/] The law judge reduced the civil penalty sought in the complaint from $1,000 to $500.

Respondent, a state fish and wildlife protection officer, was flying a Piper Supercub aircraft in a northerly direction along the Nushigak River near Portage Creek, Alaska, on June 27, 1988. Another officer was flying with him in the back seat as his passenger. Respondent and his co-worker were patrolling the river to check sport fishing licenses.

The main channel of the Nushigak River divides into an east channel and a west channel in the Portage Creek area. Respondent's sons were camped on an island in the Nushigak where that river divides. Respondent and the other officer interrupted their patrol to land and to take Respondent's sons fishing for several hours before returning to their patrol. Respondent landed in the east channel.

In landing, Respondent flew near several fishing boats on the river. The owner and captain of one of the boats, distressed about how close Respondent's aircraft came to his

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3/ In the recodified version of Part 91, former § 91.79(c) is § 91.119(c). The recodification did not affect the substance of this provision.

14 C.F.R. § 91.79(c) (1988) provided:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

vessel, reported Respondent to the FAA. The FAA investigated the incident and brought this action against Respondent.

The threshold issue on appeal is whether the law judge erred in denying Complainant's motion to deem the allegations of the complaint admitted when Respondent failed to file a timely answer to the complaint. Respondent, who is pro se on appeal, was represented by Leonard Linton, an assistant district attorney for the State of Alaska, in the proceedings before the law judge.[4/]

Mr. Linton failed to file an answer on Respondent's behalf within 30 days after service of the complaint, as required by 14 C.F.R. § 13.209(a).[5/] About three months after the deadline for filing an answer had passed, Complainant filed a motion to deem admitted each allegation in the complaint. Thirteen days later, Mr. Linton filed a response to Complainant's motion, an answer to the complaint, a motion to accept the late-filed answer, and an affidavit supporting the motion. Mr. Linton explained that he was unfamiliar with the Rules of Practice in FAA civil penalty cases and that he erroneously believed that his request for hearing would secure

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4/ Respondent was entitled to representation by a state attorney because the alleged violations occurred while he was flying as part of his state law enforcement duties.

5/ 14 C.F.R. § 13.209(a) provides:

> A respondent shall file a written answer to the complaint, or may file a written motion pursuant to § 13.208(d) or § 13.218(f)(1-4) of this subpart instead of filing an answer, not later than 30 days after service of the complaint.

his client an administrative hearing. He noted that Complainant had not claimed any prejudice to its case other than disruption in the orderly process of enforcement. A more appropriate way of dealing with this disruption, suggested Mr. Linton, was to impose a sanction on him, rather than to penalize his client by deeming the allegations of the complaint admitted.

The law judge denied Complainant's motion to deem the allegations in the complaint admitted on the following grounds: (1) the case was still in its early stages; (2) Complainant had not been prejudiced or unduly impeded in its preparation for trial; (3) the complaint did not on its face advise when an answer was due; and (4) Respondent should not be prejudiced by an error of counsel that was "inexplicable" in terms of counsel's years of public service.

On appeal, Complainant argues that the law judge should have granted its motion to deem the allegations of the complaint admitted. According to Complainant, Respondent's claim that he was unfamiliar with administrative practice should have been rejected because he was provided with the Rules of Practice. Complainant also asserts that the law judge's refusal to deem the allegations of the complaint admitted was contrary to In the Matter of Playter, FAA Order No. 90-15 (March 19, 1990), aff'd Playter v. FAA, Civil No. 90-3420 (6th Cir. May 16, 1991), holding that because good

cause for the respondent's failure to file an answer had not been shown, the law judge should have deemed the allegations of the complaint admitted.

Complainant asserts correctly that the issue here is whether Respondent had good cause, within the meaning of 14 C.F.R. § 13.209(f),[6/] for his failure to file an answer within the 30-day time period set by 14 C.F.R. § 13.209(a). Complainant is wrong, however, in asserting that Respondent did not have good cause for his counsel's failure to file an answer.

Although the law judge failed to make an express finding of good cause, his findings together indicate that good cause was indeed present. First, as the law judge noted, the complaint in this case was silent concerning the requirement for an answer. Second, it was not Respondent who committed the mistake, but his counsel. Respondent understandably relied upon his counsel to comply with procedural requirements. The law judge's concern that Respondent would be penalized unfairly for an error not his own was appropriate. In addition, as the law judge found, although Respondent filed his answer late, it was still filed early in the proceedings, and Complainant did not appear to have been prejudiced by the late-filing.

6/ 14 C.F.R. § 13.209(f) provides that "[a] person's failure to file an answer without good cause shall be deemed an admission of the truth of each allegation in the complaint (emphasis added."

This is not to say that parties may readily avoid procedural default merely by claiming unfamiliarity with the rules of practice. When counsel undertake to represent respondents in these proceedings, counsel are obligated to familiarize themselves with all the relevant requirements so that they may faithfully fulfill their responsibilities to their clients. Nonetheless, in this particular case it is equitable to reach the merits rather than to dispose of the case summarily due to procedural default.

Contrary to Complainant's assertions, the law judge's acceptance of the late-filed answer in this case was not inconsistent with In the Matter of Playter, FAA Order No. 90-15 (March 19, 1990), aff'd Playter v. FAA, Civil No. 90-3420 (6th Cir. May 16, 1991). Playter stands for the proposition that the requirement for an answer is not satisfied by a respondent's oral statements at an informal conference and before the complaint has even been issued. Nothing in Playter indicates that a late-filed answer will not be accepted where good cause has been found.

Although good cause was not found in Playter, the Playter case is distinguishable from the instant case in several important respects. First, the complaint sent to Mr. Playter contained an explicit statement of the requirement to file an answer. It explained unequivocally that a failure to answer would be deemed an admission of the allegations in the

complaint. In contrast, the complaint sent to Respondent did not mention the requirement for an answer.

Second, in Playter, the law judge held that statements the respondent made at an informal conference before the issuance of the complaint were an adequate substitute for an answer. In reversing, the Administrator noted that the law judge's holding would effectively eliminate the requirement for an answer. Significantly, in the instant case, the law judge did not find that Respondent's request for hearing or some other document was an adequate substitute for an answer. Instead, the law judge simply determined that there was good cause to accept Respondent's late-filed answer.

Wherever possible, cases should be disposed of on the merits after a hearing, rather than summarily because of a procedural defect. The hearing is fundamental to the concept of administrative due process. Thus, the law judge in this case did not err in denying Complainant's motion to deem the complaint admitted and proceeding with the hearing.

Respondent argues on appeal that the law judge was wrong in finding that his landing could have been made in another, more appropriate, spot. If Respondent is correct, then Respondent did not violate Section 91.79(c) because his landing fell within the takeoff and landing exception to Section 91.79(c)'s

prohibition against coming within 500 feet of any person, vessel, vehicle or structure on the surface.

In his oral initial decision, the law judge found that the main channel was a viable alternative landing spot. He appears to have both considered and rejected Respondent's testimony at the hearing that landing in the main channel was unworkable because of other traffic and strong eddies.

The law judge properly considered the appropriateness of the landing site.[7/] Even if certain areas of the main channel were not suitable for landing, the law judge did not err in finding that there was at least one other spot more appropriate for landing than the one chosen by Respondent. Michael Ribbage and Kenneth Owsichek, who are pilots familiar with this river, testified that they would not have landed where Respondent did and that there were more suitable landing sites on the river. Mr. Ribbage testified, for example, that "I've never seen [other float planes] land in that area [where Respondent landed]. At

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7/ While the Administrator has not previously addressed the appropriateness of a landing site, the National Transportation Safety Board has. In Administrator v. Cobb & O'Connor, 3 NTSB 98, 100 (1977), the NTSB made clear that the takeoff and landing exception to Section 91.79 would not be read to excuse low flight where necessary for "any takeoff or any landing from any area anywhere at any time." As stated by the NTSB, "[s]uch an interpretation is patently fallacious in that it would excuse low flight regardless of the appropriateness of the landing site." Id.

In Administrator v. Rees, the NTSB reaffirmed the importance of "the appropriateness of the landing site ... in terms of the necessity for a landing there ... fairly weighed in the overall context of the choices available to the pilot." 4 NTSB 1323, 1324-1325 (1984).

that time, they always go down river. They always use the wider, longer, straighter stretch of river." Tr. 50, 51.

Respondent should have found some other spot where he could have landed without coming so close to people and boats on the water.[8/] If there was no other safe spot for landing, then Respondent should not have landed. Respondent was not landing to respond to an emergency. Instead, he was landing to go fishing.

Complainant also contends on appeal that the law judge erred in dismissing the allegation that Respondent operated his aircraft in a careless manner in violation of Section 91.9. Despite the law judge's finding to the contrary, piloting an aircraft at an altitude of between 50 to 80 feet, even if one does not fly directly over people and boats on the river[9/] is inherently careless and potentially dangerous. In the words of the National Transportation Safety Board (NTSB) in a similar case:

> Such a narrow separation leaves an insufficient margin for even a slight misjudgment on the part of the pilot or for any maneuvering if the aircraft should suddenly develop a malfunction, such as an engine problem.

8/ According to the law judge, Respondent came between 50 to 80 feet from the surface, and Respondent himself admits that his altitude was only 75 feet on his second pass over the river before landing. Tr. 83, 293. The law judge found that the river was about 500 feet wide.

9/ Respondent testified at the hearing that he did not fly directly over the people and boats on the river. Tr. 181, 182, 199, 214-215.

Administrator v. Wilson, 1 NTSB 1772, 1773 (1972).[10/] As the NTSB has found repeatedly, "a section 91.9 infringement is almost invariably concomitant with a section 91.79(c) violation." Administrator v. Silvernail, 2 NTSB 191, 193 (1973). "The danger to life and property is readily apparent when an aircraft is operated at an excessively low altitude." Id.

After finding that Respondent violated Section 91.79(c) but not Section 91.9, the law judge reduced the civil penalty from the $1,000 sought in the complaint to $500. Because the law judge erred in dismissing the Section 91.9 violation, a civil penalty of $1,000 is appropriate.

The law judge's decision is affirmed in part and reversed in part, and a civil penalty of $1,000 is assessed.[11/]

THOMAS C. RICHARDS, Administrator
Federal Aviation Administration

Issued this 20th day of July, 1992.

10/ The respondent in this case flew his aircraft within 100 feet of two separate groups of visitors and park rangers at a national park. The purpose of the flight was to show his son the sand dunes in the park. The NTSB held that he violated both Section 91.79(c) and Section 91.9.

11/ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).